## FEDERAL INDIAN LAW AND POLICY - OVERVIEW

Federal common law has long recognized that "Indian nations" are "distinct political communities retaining their original natural rights..." Worcester v. The State of Georgia, 31 U.S. (6 Pet.) 515, 559 (1832). Indian tribes possess "attributes of sovereignty over both their members and their territory." United States v. Mazurie, 419 U.S. 544, 557 (1975).

In addition, it has been long established that there is a "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people...which is humane and self-imposed" and involves "moral obligations of the highest responsibility..." Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942). The basis for a special legal relationship between Indian people and the Federal government is found directly in the Constitution, see Art. I., sec. 8, par. 3, and memorialized in a score of treaties. This trust relationship applies to all Federal agencies and to Federal action outside Indian reservations. See, e.g., Nance v. Environmental Protection Agency, 645 F.2d 701, 711 (9th Cir. 1981), cert. den. 454 U.S. 1081 (1981); Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy, 898 F.2d 1410, 1420 (9th Cir. 1990). Because of its trust responsibility and treaty obligations, the Federal government has ssumed the specific responsibility for protecting and fostering he well-being of Indian people, including the continuation of their societies, cultures and communities. Legislation in the area of Indian religion and culture includes the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 et seq., the Native American Languages Act, 25 U.S.C. 2901 et seq., statutes addressing ownership or access to sacred sites, 25 U.S.C. 640d-19, 16 U.S.C. 228i(c), 16 U.S.C. 410ii-4, 16 U.S.C. 543f, 16 U.S.C. 460uu-47, 16 U.S.C. 410pp-6, P.L. 98-408, P.L. 95-498, P.L. 95-499, statutes addressing the religious and cultural use of animals, 16 U.S.C. 668a and 16 U.S.C. 1371(b), and a statute protecting Native American religious use of peyote, 42 U.S.C. 1996a.

## NATIONAL HISTORIC PRESERVATION ACT

### Overview

The National Historic Preservation Act (NHPA) can be found at 16 U.S.C. 470 through 470w-6. P.L. 102-575 amended the NHPA in a number of respects. The most important change for the purposes of this course was the addition of a section on "Historic Properties of Indian tribes" codified as 16 U.S.C. 470a(d).

### National Register of Historic Places

The NHPA protects "districts, sites, buildings, structures and bjects significant in American history, architecture, archaeology, engineering, and culture." 16 U.S.C. 470a(a)(1)(A).

The NHPA creates a National Register of Historic Places maintained by the National Park Service. 16 U.S.C. 470a(a). Nominations to the National Register are made on standard forms prepared by the NPS. 36 C.F.R. 60.5. The State Historic Preservation Officer (SHPO) supervises the process generally, 36 C.F.R. 60.6, but nominations for properties under a Federal agency's control are prepared (in consultation with the SHPO and chief local elected official) under the supervision of the Federal Preservation Officer designated by the head of the Federal agency to fulfill the agency's NHPA responsibilities. 36 C.F.R. 60.9. Outside parties can also submit completed nomination forms to a Federal agency which must submit the forms to the NPS within 90 days of receipt by the agency if they are adequate. 36 C.F.R. 60.11.

National Historic Landmarks are specific historic properties of "national significance" in that they "possess exceptional value or quality in illustrating or interpreting the heritage of the United States in history, architecture, archeology, engineering and culture" and "possess a high degree of integrity of location, design, setting, materials, workmanship, feeling and association." 36 C.F.R. 65.3(i); 36 C.F.R. 65.4(a). There is a separate process for nominating National Historic Landmarks. See 36 C.F.R. Part 65.

## Criteria for eligibility

The national program established by NHPA protects places that are either listed, or eligible for listing, on the National Register.

Regulations issued by the National Park Service, 36 C.F.R. 60.4, provide that a place may be eligible if it meets one of the following criteria:

> (a) It is associated with events that have made a significant contribution to the broad patterns of our history;
>
> (b) It is associated with the lives of persons significant in our past;
> (c) It has distinctive characteristics of a type, period, or method of construction, represents the work of a master, possesses high artistic values or represents a significant and distinguishable entity even though its components may lack individual distinction; or
>
> (d) It has yielded, or is likely to yield, information important in prehistory or history.

## Traditional Cultural Properties

National Park Service, National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural

roperties (1990) (Bulletin 38) defines a traditional cultural property as "one that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community." A traditional cultural property may be a wholly natural place.

Identifying traditional cultural properties requires consultation with "individuals and groups who may ascribe traditional cultural significance to locations within the study area." It must be recognized that "(s)ince knowledge of traditional cultural values may not be shared readily with outsiders, knowledgeable parties should be consulted in cultural contexts that are familiar and reasonable to them."

The 1992 amendments to the NHPA recognized and endorsed this concept. 16 U.S.C. 470a(d)(6)(A) provides that "[p]roperties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register."

**National Park Service**

The duties of the National Park Service (NPS) include maintaining a National Register of Historic Places and establishing criteria for such sites, reviewing and approving state and tribal historic preservation programs, administering a grant program, promulgating regulations governing Federal agency historic preservation programs and operating and preparing various educational and training programs and materials. 16 U.S.C. 470a; 16 U.S.C. 470w(11).

**Advisory Council on Historic Preservation**

16 U.S.C. 470i establishes a twenty member Advisory Council consisting of:

(1) a Chairman appointed by the President selected from the general public;
(2) the Secretary of the Interior;
(3) the Architect of the Capitol;
(4) the Secretary of Agriculture;
(5) the heads of four other Federal agencies which affect historic preservation, appointed by the President;
(6) one Governor appointed by the President;
(7) one mayor appointed by the President;
(8) the President of the National Conference of State Historic Preservation Officers;
(9) the Chairman of the National Trust for Historic Preservation;
(10) four experts in historic preservation appointed by the

President;

(11) three members of the general public appointed by the President; and

(12) one member of an Indian tribe or Native Hawaiian organization.

The Council has full-time staff in Washington D.C. and Denver who handle the day-to-day responsibilities of the Council under the NHPA. See 16 U.S.C. 470m.

The most important sections providing specific responsibilities to the Council are the following:

Section 106 (16 U.S.C. 470f) - Council must have "a reasonable opportunity to comment with regard to...undertaking" which may have an "effect" on a property which "is included in or eligible for inclusion in the National Register."

Section 110(f) (16 U.S.C. 470h-2(f)) - Council must have "a reasonable opportunity to comment on [an]...undertaking...which may directly and adversely affect any National Historic Landmark."

Section 211 (16 U.S.C. 470s) - Council is authorized to promulgate regulations implementing section 106 of the NHPA. The implementing regulations create a consultation process and provide for Advisory Council oversight of section 106 compliance. 36 C.F.R. Part 800.

## State Historic Preservation Officers (SHPOs)

Provisions dealing with State Historic Preservation Officers are found in 16 U.S.C. 470a(b). Other duties are set out in regulations issued by the National Park Service. 36 C.F.R. 61.4(b). The statute and regulations provide for:

- Approval of State Historic Preservation Programs by the National Park Service if such programs provide for a State Historic Preservation Officer appointed by the governor of the State, appointment of qualified staff, adequate public participation and periodic reviews of the State program; and

- Administration of the State Historic Preservation Program by the SHPO, including section 106 consultation with Federal agencies to mitigate the effect of undertakings upon historic properties, identification and evaluation of National Register properties and advising Federal and State agencies and local governments.

## The Section 106 process

Section 106 (16 U.S.C. 470f) provides that

"[A]ny Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking ... and ... any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license ... take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. [A]ny such Federal agency shall afford the Advisory Council on Historic Preservation ... a reasonable opportunity to comment with regard to such undertaking."

The statutory definition of "undertaking", 16 U.S.C. 470w(7), as revised by the 1992 NHPA Amendments, now provides:

"Undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including --

(A) those carried out by or on behalf of the agency;

(B) those carried out with federal financial assistance;

(C) those requiring a Federal permit, license, or approval; and

(D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 16 U.S.C. 470w(7).

Courts have held a wide variety of actions to be "undertakings" for purposes of section 106, including approvals of Indian land transactions by the Bureau of Indian Affairs (BIA), construction activities, land management decisions, rulemaking actions, mining lease approvals, federal permits and licenses for activities on private lands and the approval of federal financial assistance. Some courts have held certain federal actions not to be undertakings, e.g., where the federal action was not a prerequisite for a nonfederal project, was merely ministerial, or authorized truly inconsequential activities. See Suagee, Tribal Voices in Historic Preservation, 21 Vt. L. Rev. 145, 188 (1996).

Regulations implementing section 106 are found at 36 C.F.R. Part 800. Federal agencies who are engaged in an undertaking must determine if the undertaking will have an adverse impact upon prehistoric or historic sites that are listed or eligible for listing in the National Register of Historic Places. 36 C.F.R. 800.4 and 800.5. The determination as to whether a project is an undertaking, and thus subject to the regulatory provisions of the NHPA, is initially made by the Federal agency. 36 C.F.R. 800.4(a). The agency must identify historic properties (i.e., listed or eligible properties) within the proposed undertaking's "area of potential effects." 36 C.F.R. 800.4 (a)(1). The effort to identify historic properties must be a

"reasonable and good faith effort." 36 C.F.R. 800.4(b). In one case, for example, the Forest Service was held to have violated the "reasonable" effort requirement by failing to follow the guidelines in Bulletin 38 after having been given information indicating that traditional cultural properties were present in the area affected by an undertaking. Pueblo of Sandia v. United States, 50 F.3d 856, 860-62 (10th Cir. 1995). The agency must then assess the effects of the undertaking on historic properties which have been identified. 36 C.F.R. 800.5. When the integrity of sites that may be historic properties are threatened by an undertaking, the Federal agency is then required to consult with the State Historic Preservation Office (SHPO) concerning site eligibility for the National Register and project effects. 36 C.F.R. 800.4(b),(c); 800.5(a),(c).

Where there is an adverse effect, the agency, SHPO and (if it so chooses) the Advisory Council on Historic Preservation, an independent agency of the Federal government created by the NHPA, consult on methods for mitigating the effects. 36 C.F.R. 800.5(e). If the parties can agree upon mitigation measures, a Memorandum of Agreement (MOA) is usually executed. 36 C.F.R. 800.5(e)(4). Currently, the Advisory Council reviews all such agreements. 36 C.F.R. 800.6(a). If agreement cannot be reached, the Advisory Council is given the opportunity to comment on the undertaking to the head of the Federal agency involved in the undertaking. 36 C.F.R. 800.5(e)(6); 800.6(b). Once these comments have been considered, the agency may proceed with the undertaking as it sees fit, provided that a Federal agency decision to proceed with the undertaking must be made by the head of the agency -- such a decision cannot be delegated. 16 U.S.C. § 470h-2(l); 36 C.F.R. 800.6(c)(2). The agency, SHPO and Advisory Council may agree to invite other parties to take part in an Agreement as consulting parties and the agency is also required, in certain circumstances, to consider input from certain interested parties before entering into such agreements. 36 C.F.R. 800.5(e)(1),(3),(4). Tribes have specific consultation rights under the statute (see below).

NHPA regulations also permit the development of Programmatic Agreements (PAs) which govern the broader implementation of particular programs, as opposed to addressing the impact of a particular planned undertaking. 36 C.F.R. 800.13.

Finally, the NHPA regulations mandate coordination of NHPA requirements with National Environmental Policy Act (NEPA) mandates "[t]o the extent feasible...", 36 C.F.R. 800.14(a). However, the requirements of each Act are separate and distinct.

The regulations have not yet been amended to implement the 1992 NHPA Amendments. Proposed rules to implement the 1992 Amendments and simplify the process were published September 13, 1996, 61 Fed. Reg. 48580. In October 1997, the Advisory Council

pproved a set of revised regulations to be submitted to the ffice of Management and Budget (OMB) in the Executive Office of the President for inter-agency review. However, due to disagreements between OMB and the Advisory Council as to the substance of the regulations, these regulations were withdrawn by the Advisory Council on November 6, 1998. Instead, the Council intends to issue "guidance" that will address implementation of the 1992 amendments.

## Rights of Indian Tribes

The provisions dealing with Indian tribes are found at 16 U.S.C. 470a(d).

## Tribal Governmental authority on "tribal lands"

Like other environmental statutes amended since 1986, the 1992 NHPA Amendments authorize tribal governments to assume roles like those of state governments.

A tribe can assume any or all of SHPO roles for "tribal lands". 16 U.S.C. 470a(d)(2). "Tribal lands are defined as "(A) all lands within the exterior boundaries of any Indian reservation; and (B) all dependent Indian communities." 16 U.S.C. 470w(14). Currently, 17 tribes have approved Tribal istoric Preservation Officers (THPOs) and have assumed the SHPO oles on their tribal land. Any tribe that assumes SHPO functions must have a plan approved by the Secretary (acting through the National Park Service). 16 U.S.C. 470a(d)(2)(D). Tribal regulations may be used for the section 106 process in lieu of the Advisory Council's regulations. 16 U.S.C. 470a(d)(5)

As noted, regulations implementing the 1992 amendments which would specify the exact role of tribes in regard to federal undertakings affecting tribal land have not been adopted. The regulations which were withdrawn would have explicitly recognized that tribes have extensive authority equivalent to the SHPO in the case of tribal lands, regardless of whether the tribe has an approved THPO, based upon the tribe's inherent sovereignty. In the case where a THPO has been approved, the regulations would have provided for no SHPO role in regard to on-reservation undertakings unless the tribe agreed to a SHPO role, off-reservation properties were affected or a non-Indian landowner within the reservation requested SHPO involvement. It is probable, but not certain, that the "guidance" to be issued will be similar to the proposed regulation.

## Traditional religious and cultural properties

Where traditional cultural properties not on tribal lands are involved, regulations adopted in 1986 require that Indian ribes be provided with "the opportunity to participate as

interested persons." Moreover, "[t]raditional cultural leaders are considered to be interested persons with respect to undertakings that may affect historic properties of significance to such persons." 36 C.F.R. 800.1(c)(2)(iii).

The 1992 amendment to the NHPA has strengthened these requirements. It provides that "a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance" to a property which falls under the Act. 16 U.S.C. 470a(d)(6)(B). The amendment also specifically recognizes that "properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register." 16 U.S.C. 470(d)(6)(A). The language in the amendments suggests a role for Indian tribes in the process, when a property of cultural or religious significance is involved, which would be similar to that of the SHPOs.

As noted, regulations to implement these amendments have not been approved. It is likely that the "guidance" to be issued will indicate that tribes should be active consulting parties throughout the section 106 process and that agencies have the obligation to take affirmative steps to identify those tribes which must be consulted.

## Rights of Native Hawaiian Organizations

Provisions dealing with Native Hawaiian organizations can be found at 16 U.S.C. 470a(d)(6). Native Hawaiian organization is defined as an organization which:

1. Serves and represents the interests of Native Hawaiians;

2. Has a primary purpose of providing services to Native Hawaiians; and

3. Has expertise in Native Hawaiian Affairs.

The Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei are specifically included as Native Hawaiian organizations.

## Section 110

Section 110 (16 U.S.C. 470h-2) establishes programmatic responsibilities for Federal agencies. Each Federal agency is required to establish a preservation program, which "shall ensure" that --

(a)historic properties under the agency's jurisdiction or control are identified, evaluated, nominated to the National

Register, and that such properties are managed in ways that consider their "historic, archaeological, architectural, and cultural values"; and

(b) preservation-related activities are carried out in consultation with, among others, Indian tribes and Native Hawaiian organizations. [16 U.S.C. 470h-2(a)(2)(A), (B) and (D)]

In addition, Federal agency procedures for section 106 must be consistent with the Advisory Council's regulations and must provide for --

(a) consultation with Indian tribes and Native Hawaiian organizations; and

(b) the disposition of "cultural items" covered by the Native American Graves Protection Act (NAGPRA) in accordance with NAGPRA. [16 U.S.C. 470h-2(a)(2)(E)]

Furthermore, section 110 places substantive restrictions upon Federal agencies where an undertaking may directly and adversely affect a National Historic Landmark (NHL). A Federal agency must take steps to minimize harm to the NHL. 16 U.S.C. § 470h-2(f). The Advisory Council section 106 regulations are applicable to such undertakings. 36 C.F.R. 800.10.

Although not technically part of section 110, it worth noting that substantive restrictions are also placed upon an undertaking which uses federal Department of Transportation (DOT) funding. Land that is part of an historic site of national, state, or local significance can be used in such a project only if there is "no prudent and feasible alternative" and the program or project includes all possible planning to minimize harm to the historic site. 49 U.S.C. § 303(c) (commonly known as "section 4(f)").

## Section 112

Section 112 requires that the National Park Service issue guidelines for federal, state and tribal historic preservation programs. These programs must include plans to promote the protection of Native American cultural items and properties of religious and cultural importance to Native people, including encouraging private landowners to consult with tribes before excavating or disposing of cultural items. Section 112 is codified at 16 U.S.C. 470h-4.

## Confidentiality

Bulletin 38 recognizes that "[p]articularly where a property has supernatural connotations in the minds of those who ascribe

significance to it, or where it is used in ongoing cultural activities not readily shared with outsiders, it may be strongly desired that both the nature and the precise locations of the property be kept secret...However concerned one may be about the impacts of such a project on a traditional cultural property, it may be extremely difficult to express these concerns to an outsider if one's cultural system provides no acceptable mechanism for doing so."

Section 304(a) (16 U.S.C. 470w-3(a)) requires Federal agencies or any "other public official receiving grant assistance pursuant to [the NHPA], after consultation with the Secretary [of the Interior]...[to] withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the Secretary and the agency determine that disclosure may--

(1) cause a significant invasion of privacy;
(2) risk harm to the historic resources; or
(3) impede the use of a traditional religious site by practitioners."

This is the primary mechanism for addressing the confidentiality concerns of Native Americans within the context of the NHPA. If this is not sufficient to satisfy the confidentiality needs raised by Native Americans, however, Bulletin 38 also recognizes that an agency may choose "not to seek formal determinations of eligibility [in regard to a specific site or area], but simply to maintain some kind of minimal data in planning files."

## ARCHEOLOGICAL RESOURCES PROTECTION ACT (ARPA)

### Overview

The Archeological Resources Protection Act, 16 U.S.C. 470aa-47011, regulates the issuance of permits for excavations of archeological sites on federal and tribal lands. Most aspects of ARPA, including procedures for obtaining permits, are governed by uniform regulations issued jointly by the Secretaries of Interior, Agriculture and Defense, and the Chairman of the Tennessee Valley Authority. An identical set of the uniform regulations is codified in four separate titles of the Code of Federal Regulations at 18 C.F.R. part 1312, 32 C.F.R. part 229, 36 C.F.R. part 296 and 43 C.F.R. part 7.

### Things covered by ARPA

ARPA applies to archaeological resources imbedded in, or removed from, federal public lands and Indian lands. It also prohibits interstate commerce in any archaeological resources in violation of state or local law. 16 U.S.C. 470bb defines

archaeological resource" as "any material remains of past human life or activities which are of archaeological interest." No item of less than 100 years of age is included. Statutory language expressly includes graves and human skeletal remains. Definition is elaborated in uniform regulations, including explanation of phrase "of archaeological interest." 36 C.F.R. 229.3(a).

## Places covered by ARPA

The term "public lands" means:

> "(A) lands which are owned and administered by the United States as part of --
>
> (i) the national park system,
>
> (ii) the national wildlife refuge system, or
>
> (iii) the national forest system; and
>
> (B) all other lands the fee title to which is held by the United States, other than lands on the Outer Continental Shelf and lands which are under the jurisdiction of the Smithsonian Institution." [16 U.S.C. 470bb]

The term "Indian lands" means:

> "Lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for subsurface interests in lands not owned or controlled by an Indian tribe or an Indian individual." [16 U.S.C. § 470bb]

## Prohibited acts and penalties

Prohibitions are set out in 16 U.S.C. 470ee. The basic prohibition is that:

> "No person may excavate, remove, damage, or otherwise alter or deface or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resources located on public lands or Indian lands unless such activity is pursuant to a permit issued [pursuant to ARPA or the 1906 Antiquities Act] or the exemption contained in [16 U.S.C. 470cc(g)(1)]."

The exemption referenced above exempts any Indian tribe from the permit requirement for excavations on Indian lands of such tribe, and also exempts any tribal member if the tribe has a law regulating the excavation or removal of archaeological resources. See Bureau of Indian Affairs implementing regulations, 25 C.F.R. 262.4.

In addition, ARPA prohibits the sale, purchase, exchange,

transport, receipt, or offer to sell, purchase or exchange of any archaeological resource if: (1) such resource was excavated or removed from federal or Indian lands in violation of ARPA or the ARPA regulations; and (2) if an act took place in interstate or foreign commerce that constituted a violation of state or local law.

Violations of ARPA are subject to criminal and/or civil penalties. Criminal penalties may include imprisonment. Civil penalties are imposed by the federal land manager. For violations occurring on Indian lands, ARPA provides that all penalties collected are to be paid to the Indian tribe or landowner. For violations on federal lands, persons providing information leading to a conviction or the assessment of a civil penalty can receive rewards up to $500.

**Permit application procedures - federal lands**

16 U.S.C. 470cc(c) requires that, if a permit may result in "harm to, or destruction of, any religious or cultural site," the federal land manager must provide notice to "any Indian tribe which may consider the site as having religious or cultural importance." Such a site need not be a traditional cultural property eligible for the National Register to entitle a tribe to a right to receive notice. The uniform regulations require 30-day notice to recognized tribes. 43 C.F.R. 7.7(a)(1). Notice to known Native American groups other than recognized tribes is encouraged. 43 C.F.R. 7.7(a)(2).

The regulations specifically require each federal land manager to proactively identify and initiate communication with all "Indian tribes having aboriginal or historic ties to lands under the Federal land manager's jurisdiction." 43 C.F.R. 7.7(b)(1).

**Permit application procedures - Indian lands**

The ARPA permit requirement applies only to "Indian lands" as defined above. NAGPRA, as discussed below, extends this permit requirement to all other lands within the boundaries of Indian reservations, and to dependent Indian communities, when Native American human remains and cultural items covered by NAGPRA are involved. 25 U.S.C. 3002(c)(1). In addition to the uniform regulations, ARPA permits for Indian lands are also governed by DOI supplemental regulations, 43 C.F.R. 7.31-.37, and BIA regulations, 25 C.F.R. part 262.

Tribes are statutorily exempt from the permit requirement, and tribal members are exempt if the tribe has enacted its own law. Tribal employees are covered by a tribe's exemption. 25 C.F.R. 262.4. Tribal consultants and contractors are not exempt, but expedited permit procedures are available. 25 C.F.R.

262.5(f).

Consent is required from the tribe having jurisdiction and, in the case of individually owned Indian lands, from the landowner(s). 43 C.F.R. § 7.8(5). For individually owned Indian lands with multiple owners, the Secretary, acting through BIA, can grant consent for Indian owners. 43 C.F.R. 7.35, 25 C.F.R. 262.6.

### Criteria for the issuance of a permit

The criteria for issuance of a permit are as follows: (1) the applicant is qualified, (2) the undertaking is designed to advance archeological knowledge in the public interest, (3) (except as modified by NAGPRA) the resources will remain the property of the United States and be preserved in an appropriate institution and (4) the activity is consistent with the applicable land management plan. 16 U.S.C. 470cc(b).

Permits that are issued under ARPA may be issued with such conditions and restrictions as may be necessary to carry out the purposes of ARPA, including mitigation and avoidance measures. 16 U.S.C. 470cc(d).

## NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA)

The Native American Graves Protection and Repatriation Act is codified at 25 U.S.C. 3001-3013.

### Who and what is covered by NAGPRA

NAGPRA provides various repatriation, ownership and control rights to descendants of a deceased Indian individual and to Indian tribes and Native Hawaiian organizations.

"Lineal descendants" can be traced not only through the common law system used by Federal and state courts, but "by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization." 43 C.F.R. 10.2(b)(1); 43 C.F.R. 10.14(b).

"Indian tribe" is defined to mean "any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. 3001(7). In the only court case interpreting this provision in NAGPRA to date, a Federal District Court found that this definition includes both tribes recognized by the Secretary of Interior and other "aggregations" of Indians which have receiving funds and assistance from other departments of the

Federal government. Abenaki Nation of Missiquoi Indians v. Hughes, 805 F.Supp. 234 (D.Vt. 1992), aff'd 990 F.2d 729 (2nd Cir. 1993) The list of tribes which has been distributed by the Department of Interior Consulting Archeologist, however, has generally included only those tribes commonly thought of as "federally-recognized", as well as Alaska Native corporations.

"Native Hawaiian organization" is defined as an organization which:

1. Serves and represents the interests of Native Hawaiians;

2. Has a primary purpose of providing services to Native Hawaiians; and

3. Has expertise in Native Hawaiian Affairs.

The Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei are specifically included as Native Hawaiian organizations. 25 U.S.C. 3001(11).

The term "museum" means any institution receiving federal funds which has possession or control over Native American cultural items. This definition includes not only those institutions commonly thought of as museums, but also state and local governments and educational institutions. 25 U.S.C. 3001(8). Any museum that has received funds from a Federal agency after November 16, 1990 is considered an institution which is covered by NAGPRA. This is true even if the entity is only part of a larger entity which has received Federal funds and the museum itself has not directly received Federal funding. 43 C.F.R. 10.2(a)(3)(iii).

The term "federal agency" includes all federal governmental entities except for the Smithsonian Institution which is the subject of a separate law, the National Museum of the American Indian Act. 20 U.S.C. 80q-9.

Human remains are not defined in NAGPRA, but the meaning is fairly self-evident. The regulations make clear that body items that were freely given or naturally shed by an individual (e.g., hair made into ropes) are not considered to be human remains. 43 C.F.R. 10.2(d)(1).

"Associated funerary objects" includes two categories of objects:

- Objects "reasonably believed to have been placed with individual human remains either at the time of death or later...as part of a death rite or ceremony" where both the human remains and objects are presently in the possession or control of a Federal agency or museum.

The remains and objects need not be in the possession or control of the same agency or museum -- only in the possession or control of a museum or agency so that a connection between the objects and remains is possible.

- Objects "exclusively made for burial purposes or to contain human remains." 25 U.S.C. 3001(3)(A).

"Unassociated funerary objects" are those funerary objects which were found with human remains where

- The objects can be related to specific individuals, families or known human remains or to a specific burial site of a culturally affiliated individual; and

- The human remains are not presently in the possession or control of a Federal agency or museum. 25 U.S.C. 3001(3)(B).

The regulations make clear that objects placed near human remains as part of a death rite or ceremony are covered by NAGPRA as funerary objects, in addition to those placed with human remains which is the explicit statutory language. This provision reflects the variances in tribal funerary practices. In addition, the regulations clearly recognize rock cairns, funeral pyres and other customary depositories for human remains which may not fall within the ordinary definition of a grave site. 43 C.F.R. 10.2(d)(2).

"Sacred objects" are those objects which are

- Ceremonial in nature, and

- Needed by traditional Native American religious leaders for the present day practice of traditional Native American religions. 25 U.S.C. 3001(3)(C). This includes both the use of the objects in ceremonies currently conducted by traditional practitioners and instances where the objects are needed to renew ceremonies that are part of a traditional religion. 43 C.F.R. 10.2(d)(3).

"Traditional religious leader" is defined as a person "recognized by members of an Indian tribe or Native Hawaiian organization" as an individual who

- is "responsible for performing cultural duties relating to the ceremonial or religious traditions of that Indian tribe or Native Hawaiian organization", or

- exercises "a leadership role in an Indian tribe or Native Hawaiian organization based on the tribe or

organization's cultural, ceremonial or religious practices." 43 C.F.R. 10.2(d)(3).

"Cultural patrimony" are those objects which

- Have "ongoing historical, traditional, or cultural importance central to the Native American group or culture itself", and

- Were owned by the tribe, or a subgroup thereof such as a clan or band, and could not be sold or given away by an individual. 25 U.S.C. 3001(3)(D).

## Items possessed or controlled by museums and federal agencies

NAGPRA requires museums and Federal agencies to complete an item-by-item inventory of human remains and associated funerary objects owned or possessed by them, in consultation with Native American governmental and traditional leaders. 25 U.S.C. 3003(b)(1)(A), (C). As part of the inventory, the museum or agency is required to identify the geographical origin and cultural affiliation of each item, to the extent possible, based upon information currently within its possession, as well as provide information about how and when the item was acquired by the museum or agency. 25 U.S.C. 3003(a) and (d)(2). Museums and agencies are not required to conduct new studies and additional scientific research to conclusively determine cultural affiliation, 60 Fed. Reg. 62156 (1995), nor is the bill considered to be authorization for such studies. 25 U.S.C. 3003(b).

Notice of culturally affiliated objects identified in the inventory is to be provided by museums and agencies to culturally affiliated tribes or Native Hawaiian organizations and lineal descendants, where applicable. 43 C.F.R. 10.09(e).

In the case of unassociated funerary objects, sacred objects and items of cultural patrimony, museums and agencies are required to provide a summary of these items in lieu of an object-by-object inventory. The summary must "describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable." 25 U.S.C. 3004(a), (b)(1)(A). Summaries are considered to be simply an initial exchange of information prior to consultation with Native American governmental and traditional leaders, and not the end product of a consultation process. 60 Fed.Reg. 62140, 62148 (1995). Consultation concerning the items covered by summaries should be on-going.

## Repatriation - human remains and associated funerary objects

NAGPRA requires Federal agencies and museums to expeditiously return human remains and associated funerary objects

1. Upon request of a lineal descendent of the deceased, or

2. Upon request of an Indian tribe or Native Hawaiian organization where the tribe or organization has a "cultural affiliation" with the human remains and associated funerary objects. In order for "cultural affiliation" to be established

- it must be determined that it is likely that the remains are those of a member of a particular tribe or group which existed at the time the deceased lived; and

- a reasonable connection ("shared group identity") must be shown between the present-day tribe or organization making the request and the earlier tribe or group based upon the totality of the circumstances and evidence. 25 U.S.C. 3001(2); 43 C.F.R. 10.14(d).

Cultural affiliation can be determined by a museum or Federal agency through the inventory process or proven by a tribe or Native Hawaiian organization. Many types of evidence can be used to prove cultural affiliation, including "geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion." 25 U.S.C. 3005(a)(4).

A finding of cultural affiliation

- is based upon an overall evaluation of the evidence,

- should not be precluded solely because of gaps in the record, and

- is warranted when the evidence shows that it is more likely than not that there is an affiliation. 43 C.F.R. 10.14(d) and (f).

Cultural affiliation need not be established with scientific certainty and repatriation is not to be delayed pending additional scientific research; the determination of cultural affiliation in an inventory should be based upon information within the current possession of the museum or agency. 43 C.F.R. 10.14(d) and (f); 60 Fed.Reg. 62156 (1995).

Upon request, Indian tribes and Native Hawaiian

organizations who may be culturally affiliated with certain items must be provided with available documentation by agencies and museums. Available documentation includes "a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data." 25 U.S.C. 3003(b)(2).

The regulations require repatriation within 90 days of a valid request, provided that a Federal Register notice must be published at least 30 days prior to repatriation. 43 C.F.R. 10.10(b)(2). The transfer of items must take place using appropriate procedures which respect traditional customs and practices. 43 C.F.R. 10.6(c).

There is no time limit for submitting a repatriation claim. 60 Fed.Reg. 62155 (1995). However, a claim is waived if it is not made prior to a valid repatriation of human remains or cultural items. 43 C.F.R. 10.15(a).

Two exceptions exist to the requirement that human remains and associated funerary objects be "expeditiously returned" after cultural affiliation has been determined.

1. Where the remains or objects are "indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States", in which case the items must be returned within 90 days after the completion of the study, 25 U.S.C. 3005(b); and

2. Where more than one tribe, Native Hawaiian organization or descendant makes a claim and the Federal agency or museum "cannot clearly determine which requesting party is the most appropriate claimant". 25 U.S.C. 3005(e). In such a case, the Federal agency or museum may retain the item until the parties agree or a court decides who should receive the items.

**Repatriation - unassociated funerary objects, sacred objects and cultural patrimony**

There is a four-step process for repatriating unassociated funerary objects, sacred objects and cultural patrimony.

First, the claimant must show that the item claimed is either an unassociated funerary object, sacred object or item of cultural patrimony. See generally 25 U.S.C. 3005, 3001(3).

Once it has been shown that an item is an unassociated funerary object, sacred object or item of cultural patrimony, either

1. In the case of unassociated funerary objects, the

cultural affiliation is determined as described above, 25 U.S.C. 3005(4), or,

2. In the case of sacred objects and items of cultural patrimony, the requesting tribe or Native Hawaiian organization must show that the object was previously owned or controlled by the tribe, organization or a member thereof, 25 U.S.C. 3005(a)(5), or

3. In the case of a claim by an individual for a sacred object, that individual must show that he or she is a lineal descendant of the person who owned the object. 25 U.S.C. 3005(a)(5)(A).

If a tribe or Native Hawaiian organization is making a claim based upon prior ownership or control by a tribal member, as opposed to the tribe, the tribe must show that there are no direct descendants of the individual or that the descendants have been notified and have failed to make a claim. 25 U.S.C. 3005(a)(5)(C).

Once it has been determined that an object is an unassociated funerary object, sacred object or cultural patrimony and that a tribe or individual has a valid claim for the object by reason of cultural affiliation or prior ownership or control, the next requirement in the bill is that the tribe, organization or individual present at least some evidence indicating that the Federal agency or museum did not have the "right of possession" of the items. 25 U.S.C. 3005(c). "Right of possession" means possession obtained with the voluntary consent of an individual or group that had the right to sell or transfer the object. 25 U.S.C. 3001(13).

This definition of "right of possession" does not apply only in the rare instance where a lawsuit is brought before the United States Claims Court (now known as the United States Court of Federal Claims) and the Court finds that the application of this definition would result in an unconstitutional Fifth Amendment taking of private property without just compensation. If such a ruling is obtained, otherwise applicable property law (federal, state or tribal) would apply to the status of the items.

If the claimant satisfies the requirements of steps 1 through 3, step 4 places a burden upon the museum or agency to prove that it has a right of possession in regard to the items in question. 25 U.S.C. 3005(c). If the museum or agency cannot prove right of possession, the unassociated funerary object, sacred object or item of cultural patrimony must be returned -- unless the scientific study or competing claims exceptions discussed earlier apply.

NAGPRA makes clear that the repatriation provisions in

NAGPRA are not meant to limit the general repatriation authority of Federal agencies and museums which may have existed prior to NAGPRA. 25 U.S.C. 3009(1)(A) If an Indian tribe or Native Hawaiian organization which might have a claim in regard to certain items chooses not to immediately repatriate, the tribe or organization and the museum or agency may enter into an agreement regarding how such items will be treated by the museum or agency. 25 U.S.C. 3009(1)(B).

**Embedded remains and cultural items on federal and tribal land**

"Federal land" is defined as non-tribal land controlled or owned by the United States, including lands selected by, but not yet conveyed to, Alaska Native corporations and groups pursuant to the Alaska Native Claims Settlement Act of 1971. 25 U.S.C. 3001(5).

"Tribal land" is defined to include

- all lands within the exterior boundaries of a reservation, whether or not the land is owned by the tribe, Indian individuals or non-Indians,

- all dependent Indian communities, and

- any lands administered for Native Hawaiians pursuant to the Hawaiian Homes Commission Act of 1920, as amended, and the Hawaii Statehood Bill. 25 U.S.C. 3001(15).

Whenever a party intends to intentionally excavate a site for any purpose:

1. That party must obtain a permit pursuant to ARPA. 25 U.S.C. 3002(c)(1).

2. If tribal lands are involved, the items may be excavated only after notice to, and consent of, the tribe or Native Hawaiian organization. 25 U.S.C. 3002(c)(2).

3. If federal lands are involved, the items may be excavated only after notice and consultation with the appropriate tribe or Native Hawaiian organization. 25 U.S.C. 3002(c)(2).

The regulations spell out in detail the notice and consultation that is required in the case of excavations on Federal lands. Written notice must be sent prior to the issuance of any approval or permit

- proposing a time and a place for meetings and consultation, and

- describing the planned activity, its location, the basis for believing that excavation may occur and the government's proposed treatment and disposition of the objects which are to be excavated.

This notice must be sent to:

- any known lineal descendants,

- Indian tribes and Native Hawaiian organizations that are likely to be culturally affiliated with the items at the site,

- any Indian tribe which aboriginally occupied the area where the activity is taking place, and

- any Indian tribe or Native Hawaiian organization that may have a cultural relationship with the imbedded items. 43 C.F.R. 10.3(c)(1), 43 C.F.R. 10.5(b)(1) and (2).

Written notification should be followed by telephone contact if there is no response within 15 days of the notice. 43 C.F.R. 10.3(c)(1).

Federal agencies are required to develop written action plans following consultation which include the following:

- kinds of objects considered cultural items,

- the information used to determine custody and how items will be disposed of in accordance with that determination,

- the planned care, handling and treatment (including traditional treatment) of cultural items,

- the planned archeological recording and analysis of items and reports to be prepared, and

- how tribes will be consulted at the time of excavation.

43 C.F.R. 10.5(e).

The regulations also encourage the development of comprehensive agreements between Indian tribes, Native Hawaiian organizations and Federal agencies which would

- "address all Federal agency land management activities that could result in the intentional excavation or inadvertent discovery" of NAGPRA items, and

- establish processes for consultation and determination of custody, treatment and disposition of such items. 43 C.F.R. 10.5(f).

The commentary to the regulations indicates that one goal of NAGPRA is "in situ" preservation, and that this should be considered whenever possible. 60 Fed.Reg. 62141, 62146 (1995). However, "in situ" preservation of sites is not required by NAGPRA or the regulations except in the case of intentional excavations on tribal lands where the required tribal consent has not been obtained.

Where imbedded cultural items have been inadvertently discovered as part of another activity, such as construction, mining, logging or agriculture:

1. The person who has discovered the items must temporarily cease activity and notify the responsible Federal agency (in the case of federal land) or the appropriate tribe or Native Hawaiian organization (in the case of tribal land). 25 U.S.C. 3002(d)(1) In the case of Alaska Native Claims Settlement Act lands (still owned by the Federal government) selected by, but not conveyed to, the Alaska Native corporation or group, that corporation or group is the appropriate organization to be notified. When notice is provided to the Federal agency, that agency has the responsibility to promptly notify the appropriate tribe or Native Hawaiian organization. 43 C.F.R. 10.4(d)(1)(iii). Consultation then proceeds in a manner similar to the process described above under "intentional excavations". 43 C.F.R. 10.4(d)(1)(iv).

2. Activity may resume thirty days after the Secretary of the appropriate federal department, the Secretary of Interior if authority has been delegated to him or the Indian tribe or Native Hawaiian organization certifies that notice has been received. 25 U.S.C. 3002(d)(1) and (3). The activity which resulted in the inadvertent discovery may also resume prior to the 30 day period specified in the statute if a written agreement on a recovery plan is executed by the Indian tribe or Native Hawaiian organization and the Federal agency prior to the expiration of the 30 day period. 43 C.F.R. 10.4(d)(2). This requirement must be included in Federal leases and permits. 43 C.F.R. 10.4(g).

Under NAGPRA, Indian tribes, Native Hawaiian organization or descendants of the deceased will usually have ownership and control over human remains and cultural items which may be discovered or excavated on federal and tribal lands in the future, regardless of whether such discovery or excavation is intentional or inadvertent. In the case of human remains and associated funerary objects, any lineal descendant of the buried person has the initial right of ownership or control of that person's remains and funerary objects associated with the remains. 25 U.S.C. 3002(a)(1). Where descendants of the human remains and associated funerary objects cannot be determined and

in the case of unassociated funerary objects, sacred objects and items of cultural patrimony, NAGPRA establishes the following rules:

1. The tribe or Native Hawaiian organization owns or controls all cultural items discovered on tribal land. 25 U.S.C. 3002(a)(2)(A).

2. In the case of federal land, the tribe or Native Hawaiian organization with the closest cultural affiliation to the items has ownership or control. 25 U.S.C. 3002(a)(2)(B). Agreements between tribes regarding disputed items are possible and the NAGPRA Review Committee may serve as a mediator if there is an intertribal dispute. 25 U.S.C. 3006(c)(4); 43 C.F.R. 10.17.

3. Where cultural affiliation of the items cannot be established, but the objects are discovered on federal land which the Indian Claims Commission or United States Court of Claims [now known as the United States Court of Federal Claims] has determined to be the aboriginal land of a particular tribe, the tribe which obtained the judgment has the right of ownership and control over the items unless another tribe can show a stronger cultural relationship. 25 U.S.C. 3002(a)(2)(C).

Prior to transferring ownership or control of embedded cultural items to lineal descendants, tribes or Native Hawaiian organizations, the Federal agency must publish at least two general notices, a week apart, of the proposed disposition in a newspaper circulated in an area where the members of the tribe or organization reside. Transfer may not take place until 30 days after the second notice. If competing claimants come forward, the proper recipient must be determined in accordance with the statutory preferences. 43 C.F.R. 10.6(c).

**Penalties and implementation**

NAGPRA prohibits all trafficking in Native American human remains for sale or profit unless the remains have been "excavated, exhumed or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization." 18 U.S.C. 1170(a), as amended by section 4(a) of P.L. 101-601; 25 U.S.C. 3001(13). This prohibition applies to human remains wrongfully acquired at any time, whether before or after the enactment of NAGPRA.

NAGPRA also prohibits trafficking in funerary objects, sacred objects and items of cultural patrimony obtained in violation of the act. 18 U.S.C. 1170(b), as amended by section 4(a) of P.L. 101-601. This provision in NAGPRA applies only to

wrongful acquisitions after the date that NAGPRA was enacted (November 16, 1990). Of course, existing state or Federal law involving theft or stolen property would be available should an individual have obtained possession of a cultural item by such means before or after the enactment of NAGPRA. 25 U.S.C. 3009(5).

NAGPRA also provides that the Secretary of Interior may assess civil penalties against museums that do not comply with NAGPRA. 25 U.S.C. 3007.

NAGPRA provides for the appointment of a Review Committee to monitor and review the implementation of the Act. 25 U.S.C. 3006. The Review Committee consists of seven members:

-- three have been appointed by the Secretary of the Interior from nominations submitted by Indian tribes, Native Hawaiian organizations and traditional Native American religious leaders (at least two of the three must be traditional Native American religious leaders)

- three have been appointed by the Secretary of the Interior from nominations submitted by national museum organizations and scientific organizations; and

- one person has been chosen from a list compiled by the other six members. 25 U.S.C. 3006(b)(1).

The Review Committee's functions are to:

(1) monitor the inventory and identification process, 25 U.S.C. 3006(c)(2);

(2) upon request, make findings relating to the cultural affiliation and return of cultural items and to help resolve disputes between interested parties, 25 U.S.C. 3006(c)(3), (4) and 25 U.S.C. 3006(d);

(3) compile an inventory of culturally unidentifiable human remains and make recommendations as to an appropriate process for their disposition, 25 U.S.C. 3006(c)(5);

(4) consult with the Secretary of the Interior in the development of regulations to implement NAGPRA, 25 U.S.C. 3006(c)(7);

(5) make recommendations as to the future care of repatriated cultural items, 25 U.S.C. 3006(c)(9); and

(6) submit an annual report to Congress, 25 U.S.C. 3006(h).

An Indian tribe, Native Hawaiian organization or individual

r other entity with protected rights under NAGPRA can file a law suit to enforce the provisions of NAGPRA if there is a violation of the Act, 25 U.S.C. 3013. Once a written claim has been submitted and denied, this constitutes "exhaustion of remedies" and a claiming party may seek review of the determination by a Federal court, 43 C.F.R. 10.15(c). The claiming party also has the option to seek review of the denial by the NAGPRA Review Committee before pursuing a court remedy, although the Review Committee's findings are non-binding and of evidential value only in any subsequent court proceeding, 43 C.F.R. 10.16(b); 25 U.S.C. 3006(d).

Tribes also retain any pre-existing legal rights which they may have possessed before NAGPRA, 25 U.S.C. 3009(3), (4). If a museum repatriates an item in good faith, however, it cannot be sued if it has made a mistake, 25 U.S.C. 3005(f).

## NATIONAL MUSEUM OF THE AMERICAN INDIAN ACT

The Museum of the American Indian Act, 20 U.S.C. 80q-1 et seq. ("Museum Act") governs repatriation of cultural items by the Smithsonian Institution.

Originally, the Museum Act required the inventory of human remains and associated and unassociated funerary objects, but did not require a summary of sacred objects or cultural patrimony. 20 U.S.C. 80-9q-9(a)(1). In addition, upon request of a descendant of the deceased or by a culturally affiliated tribe, the Smithsonian was required to repatriate human remains and funerary objects. 20 U.S.C. 80q-9(c). Again, sacred objects and cultural patrimony were not covered.

In 1996, the Museum Act was amended. The ostensible purpose of the amendments was to impose repatriation, inventory and summary requirements similar to NAGPRA upon the Smithsonian Institution. For the most part, this is what the amendments have done. The amendments extend the repatriation and summary requirements of the Museum Act to sacred objects and cultural patrimony based on standards similar to NAGPRA (although they are in subtle ways different, see below). The amendments also set deadlines for the summary and inventory. 20 U.S.C. 80q-11A; 20 U.S.C. 80q-9(a)(2). However, in some respects, the amendments are potentially inconsistent with the original Museum Act and NAGPRA which may cause confusion.

For example, the original Museum Act provided for the repatriation of unassociated funerary objects to Indian tribes simply upon a showing of cultural affiliation. 20 U.S.C. 80q-9(d). The 1996 amendments subject the repatriation of unassociated funerary objects to the "right of possession" rule in NAGPRA, 20 U.S.C. 80q-11A(c), but do not repeal the original section allowing for repatriation simply upon a showing of

cultural affiliation. The amendments also require a summary of unassociated funerary objects, but do not repeal the original requirement that an inventory of these remains be done, 20 U.S.C. 80q-11A(a). While the new amendment could be read consistently with the original Act -- first a summary of unassociated funerary objects is required and later an inventory must be completed -- it is unlikely that this was intended.

Further confusion may arise in the case of Native Hawaiians. The 1989 Act left the repatriation issue up to negotiated agreements between the Office of Hawaiian Affairs, Hui Malama I Na Kupuna O Hawai'i Nei and the Smithsonian, but indicated that the principles of repatriation pertaining to Indian tribes should apply to the greatest extent practicable, 20 U.S.C. 80q-11(a)(2) and (3). The new repatriation section on unassociated funerary objects, sacred objects and cultural patrimony fully applies to Native Hawaiians, 20 U.S.C. 80q-11A(b) and (c). Depending upon what agreements have been reached, particularly in the case of unassociated funerary objects, the implementation of the original section may or may not be consistent with the new requirements. Of course, the Smithsonian may still voluntarily comply with any negotiated agreements which are more expansive than the 1996 amendments, 20 U.S.C. 80q-11A(e). However, the judicial enforceability of any agreement more expansive than the 1996 amendments is unclear. The amendments also create the confusing situation in which repatriation of human remains and associated funerary objects is governed by a negotiated agreement, but repatriation of other objects is controlled by a specific legal standard.

In addition, there are subtle differences between the repatriation section in the 1996 Museum Act amendments and the NAGPRA sections from which it was derived. These reflect some confusion in the NAGPRA statute, as well as confusion in the Museum Act, as amended. Under NAGPRA, unassociated funerary objects are repatriated (subject to right of possession rules) when they have been identified as culturally affiliated through the summary process, 25 U.S.C. 3005(a)(2), or based upon tribal proof of cultural affiliation, 25 U.S.C. 3005(a)(4). In the case of sacred objects and cultural patrimony, repatriation occurs (again subject to right of possession rules) when cultural affiliation is shown pursuant to a summary, 25 U.S.C. 3005(a)(2), or upon a tribal showing that the sacred object or item of cultural patrimony was previously owned or controlled by the tribe or a member thereof (subject to the rights of the lineal descendants of such a member), 25 U.S.C. 3005(a)(5). This last section of NAGPRA does not mention cultural affiliation. The Museum Act amendments require repatriation of unassociated funerary objects, sacred objects and cultural patrimony (subject to right of possession rules) if cultural affiliation is shown through the summary or based upon tribal proof that the items are cultural affiliated and were previously owned or controlled by

the tribe or its members, 20 U.S.C. 80q-11A(b). Thus, the Museum Act provision, based upon the somewhat inconsistent NAGPRA provisions, appears (probably inadvertently) to establish a two step requirement for repatriation of unassociated funerary objects, sacred objects and cultural patrimony, as opposed to the one step "variable" approach of NAGPRA.

Finally, the 1996 Museum Act amendments provide no definitions of "sacred objects" and "cultural patrimony". It is probable that the NAGPRA definitions were presumed. However, because the NAGPRA definitions are in some respects narrow and have been controversial, the meaning of these terms in the context of the Museum Act may be disputed. Moreover, there is only one definition of "funerary object" in the Museum Act, 20 U.S.C. 80q-14(4), rather than separate definitions for "associated" and "unassociated" funerary objects, even though the new amendments make this distinction an important one.

## NATIVE AMERICAN INDIAN RELIGIOUS FREEDOM

The American Indian Religious Freedom Act of 1978 (AIRFA) established a federal policy "to protect and preserve" American Indian religious freedom rights, including "access to sites" and "the freedom to worship through ceremonies and traditional rites." 42 U.S.C. 1996. Pursuant to AIRFA, some administrative regulations and policy statements have been issued which provide some opportunity for Indian input into land management decisions. See, e.g., 36 C.F.R. 219.1(a)(6); Bureau of Land Management Manual, part H-8160-1 (1994) at IV-1. The Supreme Court has held, however, that there is no legal redress under AIRFA available to aggrieved Indian individuals or tribes. Lyng v. Northwest Indian Cemetery Prot. Assn., 485 U.S. 439, 455 (1988). (This limitation does not apply to the 1994 amendments to AIRFA protecting the ceremonial use of peyote -- a topic beyond the scope of this course.)

In addition, an Executive Order on Native American sacred sites was issued by President Clinton on May 24, 1996. Executive Order No. 13,007, 61 Fed. Reg. 26,771 (1996). This Order directs Federal land managing agencies, "to the extent practicable, permitted by law and not clearly inconsistent with essential agency functions" to accommodate access and ceremonial use of sacred sites and to avoid adversely affecting their physical integrity. Each agency was directed to develop procedures to implement this Order and report back in one year. The Order creates no enforceable rights against the Federal government, however.

## ENVIRONMENTAL LAWS

The most generally applicable statute is the National Environmental Policy Act (NEPA). 42 U.S.C. 4321-4370a. NEPA

requires agencies to assess the impact of their activities upon the human environment. 42 U.S.C. 4332. This impact is normally assessed through the development of Environmental Assessments (EA) and Environmental Impact Statements (EIS). 40 C.F.R. 1501.3-1501.4. Consultation with and evaluation of the effects upon Indian tribes is provided for in the implementing regulations. 40 C.F.R. 1501.7(a)(1), 1502.16(c), 1503.1(a)(2)(ii), 1506.6(b)(3)(ii), 1508.5.

There is no requirement per se that the impact of a project upon a sacred site be considered within a cultural-religious framework; however, the regulations define the "human environment" to include "the relationship of people with that environment" and "effects" of a project include "cultural and social" effects. This is in addition to requirements that the ramifications of related legislation, such as the National Historic Preservation Act, be included in the overall analysis. 40 C.F.R. 1502.25.

Of course, ultimately, if an EIS and EA has fully and fairly considered the impacts of the project and all reasonable alternatives, a Federal agency may go forward with the project notwithstanding its impact. NEPA has been held to impose procedural requirements only upon Federal agencies and does not establish substantive environmental criteria. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976); City of New York v. United States Dept. of Transp., 715 F.2d 732, 748 (2nd Cir. 1983), cert. denied, 465 U.S. 1055 (1984).

Other potentially relevant statutes are those which deal with the protection of wildlife. The most well-known is the Endangered Species Act (ESA), 16 U.S.C. 1531-1544, which precludes activities which would adversely affect the habitats of threatened and endangered species. Other laws include the Bald Eagle Protection Act, 16 U.S.C. 668 to 668d, Fish and Wildlife Conservation Act, 16 U.S.C. 2901-2912 and the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. 1331-1340, among others.

There are also laws which create substantive standards in regard to pollution, such as the Clean Air Act of 1970, 42 U.S.C. 7401-7671q, Clean Water Act, 33 U.S.C. 1251-1387, and the Safe Drinking Water Act of 1974, 42 U.S.C. 300f to 300j-26.

Summarizing all potentially applicable environmental statutes is beyond the scope of this presentation, but it is worth remembering that environmental laws may be relevant in the context of cultural properties.